Jankins Louis v Public Prosecutor

HIGH COURT (SHAH ALAM) — APPEAL BY CHILDREN (CRIMINAL APPEAL) NO 41–210 OF 2008
YEOH WEE SIAM JC
7 AUGUST 2009

Children and Young Persons — Custody — Abandoned child — Order made by court for children under Child Act 2001 s 30(1)(b) & (c) — Whether subsequent revocation of order under Child Act 2001 s 30(13)(a)(bb) valid and proper — Whether granting of unconditional custody to second adoptive parents valid and proper — Whether protector failed to carry out duties properly — Determination of fit and proper person to have custody of child

Family Law — Children — Custody — Custody of abandoned child — Order made by court for children under Child Act 2001 s 30(1)(b) & (c) — Whether subsequent revocation of order under Child Act 2001 s 30(13)(a)(bb) valid and proper — Whether granting of unconditional custody to second adoptive parents valid and proper — Whether protector failed to carry out duties properly — Whether court was informed of all relevant facts — Determination of fit and proper person to have custody of child

DAL ('the child') was alleged to have been abandoned by his family. Vide the first court order dated 23 May 2006 made under s 30(1)(b) and (c) of the Child Act 2001 ('the Act'), the court for children ('CFC'), on the application of Jabatan Kebajikan Masyarakat in its capacity as protector, placed the child, until the child turned 18 years old, in the custody of Clifford Noel Dewind and Alison Geraldine Jackson ('the second adoptive parents'). Nearly two years later, the protector made an application under s 30(13)(a)(bb) of the Act to revoke the first court order. The magistrate allowed the application and granted the second court order, revoking the first court order. The effect of his decision was that the child was no longer under the care and custody of the second adoptive parents until he turned 18 years old but was now automatically allowed to live with and be under the care and custody of the second adoptive parents indefinitely, as any other child would live with his adoptive parents. The magistrate granted the second court order despite the fact that the appellant ('the first adoptive parent') had informed him that the appellant had filed an application in the High Court for a declaration that the adoption of the child by the second adoptive parents was not valid and must be set aside. The appellant filed this appeal against the second court order.

Held, allowing the appeal with no order as to costs:

(1) It is the duty of the protector to assist the CFC to come to a correct decision. The protector however did not inform the magistrate in the CFC of the latest developments and disputes between the first and second adoptive parents regarding the adoption and custody of the child. A proper investigation had to be made to determine who was the fit and proper person to have custody of the child. In making the decision to revoke the first court order, the learned magistrate had erred in fact and law (see paras 18–19).

(2) A new hearing before a new magistrate had been ordered by the High Court. This hearing had not been held yet. The protector, being fully aware of the High Court order, should not have taken the premature step of applying under s 30(13)(a)(bb) of the Act to the CFC for the revocation of the magistrate's first court order. Even with proof of registration of adoption of the child as shown by the second adoptive parents, the magistrate should not have allowed the protector's application (see para 22–23).

(3) There were new issues regarding the status of the registration of adoption obtained by the second adoptive parents for the adoption of the child eg whether the second adoptive parents had failed to inform the JPN of the appellant's interest in the child, and whether such registration was valid if, as alleged by the appellant, the requirement of the period of two years of custody had not been fulfilled. These issues had to be dealt with in the appropriate CFC and also in the civil court proceedings (see para 24(d)).

(4) It was best to let the status quo remain until the new magistrate/chairman of CFC made a decision under s 30(1)(b) and (c) of the Act on the issue as to who was the fit and proper person to have custody of the child (see para 25).

[Bahasa Malaysia summary

DAL ('kanak-kanak') dikatakan telah diabaikan oleh keluarganya. Melalui perintah pertama mahkamah bertarikh 23 Mei 2006 yang dibuat di bawah s 30(1)(b) dan (c) Akta Kanak-Kanak 2001 ('Akta'), mahkamah untuk kanak-kanak ('MK'), atas permohonan Jabatan Kebajikan Masyarakat dalam kapasitinya sebagai pelindung, menempatkan kanak-kanak tersebut, sehingga kanak-kanak itu berumur 18 tahun, dalam jagaan Clifford Noel Dewind dan Alison Geraldine Jackson ('ibubapa angkat kedua'). Hampir dua tahun kemudian, pelindung tersebut membuat satu permohonan di bawah s 30(13)(a)(bb) Akta untuk membatalkan perintah pertama mahkamah. Majistret membenarkan permohonan tersebut dan memberikan perintah

kedua mahkamah, membatalkan perintah pertama mahkamah. Kesan daripada keputusannya ialah kanak-kanak tersebut tidak lagi berada di bawah pemeliharaan dan jagaan ibubapa angkat kedua sehingga dia berumur 18 tahun tetapi sekarang secara automatiknya dibenarkan untuk tinggal bersama dan berada di bawah pemeliharaan dan jagaan ibubapa angkat keduanya selama-lamanya, sepertimana kanak-kanak yang akan tinggal bersama ibubapa angkat mereka. Majistret memberikan perintah kedua mahkamah meskipun terdapat fakta bahawa perayu ('ibubapa angkat pertama') telah memaklumkannya bahawa perayu telah memfailkan satu permohonan di Mahkamah Tinggi untuk satu deklarasi bahawa pengambilan anak angkat oleh ibubapa angkat kedua tidak sah dan perlu diketepikan. Perayu memfailkan rayuan ini terhadap perintah kedua mahkamah.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Adalah menajadi kewajipan pelindung untuk membantu MK untuk membuat keputusan yang tepat. Pelindung walau bagaimanapun tidak memaklumkan majistret di MK mengenai perkembangan terbaru dan pertikaian di antara ibubapa angkat pertama dan kedua mengenai pengambilan anak angkat dan jagaan kanak-kanak tersebut. Satu penyiasatan yang teliti mesti dibuat untuk menentukan siapa yang layak dan sesuai untuk mendapat jagaan kanak-kanak tersebut. Dalam membuat keputusan untuk membatalkan perintah pertama mahkamah, majistret tersebut telah khilaf dalam fakta dan undang-undang (lihat perenggan 18–19).

(2) Satu perbicaraan baru di hadapan majistret baru diarahkan oleh Mahkamah Tinggi. Perbicaraan ini belum dijalankan lagi. Pelindung, yang menyedari perintah Mahkamah Tinggi tersebut, tidak seharusnya mengambil langkah pramatang dengan memohon di bawah s 30(13)(a)(bb) Akta kepada MK untuk pembatalan perintah pertama mahkamah. Walaupun dengan bukti pendaftaran pengambilan anak angkat sepertimana yang ditunjukkan oleh ibubapa angkat kedua, majistret tidak seharusnya membenarkan permohonan pelindung tersebut (lihat perenggan 22–23).

(3) Terdapat isu-isu baru mengenai status pendaftaran pengambilan anak angkat yang diperoleh oleh ibubapa angkat kedua untuk pengambilan kanak-kanak tersebut sebagai anak angkat contohnya sama ada ibubapa angkat kedua gagal untuk memaklumkan JPN mengenai hak perayu terhadap kanak-kanak tersebut, dan sama ada pendaftaran tersebut sah sekiranya, sepertimana yang dikatakan oleh perayu, keperluan untuk tempoh jagaan selama dua tahun belum lagi dipenuhi. Isu-isu ini perlu diatasi di MK dan juga di prosiding mahkamah sivil (lihat perenggan 24(d)).

A (4) Adalah lebih baik untuk membiarkan status quo tersebut kekal sehingga majistret baru/pengerusi MK membuat keputusan di bawah s 30(1)(b) dan (c) Akta mengenai isu siapa yang layak dan sesuai untuk mempunyai jagaan kanak-kanak tersebut (lihat perenggan 25).]

B **Notes**

For cases on children and young persons in general, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 3299–3323.

For cases on custody of children, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2969–3002.

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Legislation referred to

Child Act 2001 ss 17(1)(c), (h), 18, 19, 30(1), (1)(b), (c), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13)(a)(bb), 95, 95(3)

Criminal Procedure Code s 254

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YN Foo (YN Foo & Partners) for the appellant.
Isa bin Hassim (Zainal Azwar bin Kamaruddin with him) for the respondent.

Yeoh Wee Siam JC:

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BRIEF FACTS

[1] This is an appeal by Jankins Louis ('the appellant') ('the first adoptive F parent') made against the order of the learned magistrate ('the magistrate') dated 24 July 2008 ('the second court order') in respect of Case No PPK8/2005 in the court for children ('CFC') in Petaling Jaya, Selangor. In the second court order, the magistrate, sitting as the chairman of the CFC, had ordered that pursuant to s 30(13)(a)(bb) of the Child Act 2001 ('the G Act'), the order of the CFC dated 23 May 2006 made under s30 (1)(b) and (c) of the Act ('the first court order') be revoked.

[2] The background facts to the above are as follows:

H **[3]** DAL ('the child') (the child's name is abbreviated here for protection of the child) was alleged to have been abandoned by his family. Vide the first court order dated 23 May 2006 (affirming the previous court order of the CFC dated 29 April 2005 ('the original order')), the CFC, on the application of Jabatan Kebajikan Masyarakat in its capacity as protector, placed the child, I until the child turns 18 years old, in the custody of a fit and proper person ie the Clifford Noel Dewind and Alison Geraldine Jackson ('the second adoptive parents'). Nearly two years later, on 15 May 2008 the protector made an application under s 30(13)(a)(bb) of the Act to revoke the first court order on the ground that there is proof that the circumstances under which

the first court order was made have changed after the making of the order, ie the child is now a legally adopted child of the fit and proper person (the second adoptive parents). A

[4] The magistrate allowed the application of the protector on 24 July 2008 and granted the second court order, which means he revoked the first court order. The effect of his decision is that the child is no longer under the care and custody of the second adoptive of parents until he turns 18 years old, which means the child is now automatically allowed to live with and be under the care and custody of the second adoptive parents indefinitely, as any other child would live with his adoptive parents. Hence, this appeal. B C

[5] In his grounds of judgment, the magistrate stated that based on the Adoption Certificate No C0000275 dated 26 June 2006 ('the adoption certificate') issued by the Timbalan Pendaftar Pengangkatan Jabatan Pendaftaran Negara Malaysia, Putrajaya ('JPN') shown to him by the protector, he was convinced that the child is now an adopted child of the second adoptive parents, with the new name, ADD. The child was then five years old and well taken care of by the second adoptive parents based on the report dated 23 October 2007 given by the protector ('the third welfare report'). The magistrate therefore applied s 30(5) of the Act and treated the best interests of the child as a paramount consideration. He granted the application of the protector and revoked the first court order made under s 30(1)(b) and (c) of the same Act, and granted the second court order, since he has seen proof that the circumstances under which the first court order was made have changed. D E F

[6] The magistrate granted the second court order despite the fact that the appellant had informed him that the appellant had filed an application in the High Court in Kuala Lumpur for a declaration that the adoption of the child by the second adoptive parents is not valid and ought to be set aside. The magistrate did not deem it fit, and was of the opinion that it was premature and not proper for him to deny the validity of the adoption certificate which had been issued by the JPN and which, the magistrate agreed, had been legally issued, unless proven otherwise. G H

[7] The magistrate also likened the powers of the protector to that of a public prosecutor under s 254 of the Criminal Procedure Code ('CPC') and stated that the public prosecutor could decline further prosecution at any stage. I

[8] Section 95 of the Act provides for an appeal from an order of a CFC to be made to the High Court by way of a criminal appeal except that the appeal should be intituled as an appeal by children. That is how this court has

A been conferred with jurisdiction over this matter. Section 95(3) of the same Act provides that the High Court, in all criminal appeals originating from a CFC, shall make its final decision within 12 months after the notice of appeal has been filed. In this case, the notice of appeal was filed on 4 August 2008. The appeal was heard by me on 31 July 2009 and my oral judgment was B given on the same day, therefore within the statutory time limit required by the Act.

THE APPELLANT'S GROUNDS OF APPEAL

C **[9]** The petition of appeal has exhaustively stated the grounds of appeal. The grounds are also re-stated and further elaborated by learned counsel for the appellant in her written submissions. Based on the new facts as disclosed by the appellant in his petition of appeal and written submissions, I am of the opinion that the magistrate's order dated 24 July 2008 made in the CFC ('the D second court order') should be set aside and the new hearing, as required by the order made by Datuk Zaharah bte Ibrahim J in the High Court in Shah Alam, be proceeded with before a new magistrate/chairman of the CFC as soon as possible. The purpose of the new hearing was for the CFC to decide on the issue under s 30(1)(b) and (c) of the Act as to who is the fit and proper E person to have custody of the child until the child is 18 years old. Pending the outcome of the new hearing before the new magistrate in the CFC, the first court order of the CFC dated 23 May 2006 (which affirmed the original order of the CFC dated 29 April 2005) is applicable, which means the child remains in the custody of the second adoptive parents until the age of 18, or F until such order is revoked or amended by the new magistrate/chairman of the CFC after the new hearing.

[10] The other grounds of appeal are basically detailed facts of pending civil court actions which are related to this case in relation to the adoption G and custody issues of the child. I shall state some of those grounds in my decision later on in this judgment.

THE RESPONDENT'S SUBMISSIONS

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[11] The public prosecutor appeared as the respondent to defend the protector's application to the CFC which had resulted in the second court order.

I **[12]** The main ground of objection to this appeal raised by the respondent is that circumstances have changed due to the petition for judicial separation filed by the appellant's wife.

[13] The respondent submitted that the protector had acted properly under s 17(1)(c) or s 17(1)(h) of the Act to conclude that the child was in need of protection and care at the time when the first court order was made. The respondent also submitted that the magistrate was right when he made the finding that the child was in need of care and protection and applied ss 18 and 19 of the Act correctly. A B

[14] The respondent further submitted that the mala fides on the part of the second adoptive parents in applying to register the child as their adopted child is an entirely different matter relating to the adoption proceedings in the sessions court and ought not to be addressed in this appellate court. C

DECISION

[15] After considering the petition of appeal and the submissions of both parties, I am of the opinion that a holistic approach should be taken for this case. This case cannot be treated in isolation by the magistrate in the CFC without reference to the actual background facts of the case. D

[16] I note with deep regret that the new hearing ordered by Datuk Zaharah bte Ibrahim J on 3 April 2007 was not carried out by the CFC until today. If the new hearing had been carried out and concluded by the CFC, there would have been no necessity for the protector to make such an application under s 30(13)(a)(bb) of the Act in the first place since the new CFC would have decided on who is the fit and proper person to have custody of the child under s 30(1)(b) and (c) of the Act. E F

[17] In the instant case, when the magistrate in the CFC was shown the adoption certificate of the child, he was satisfied that the adoption certificate was legally issued. He was also convinced that the circumstances regarding the granting of the first court order dated 23 May 2006 had changed with the adoption of the child by the second adoptive parents. He, therefore, was of the view that there was no impediment for him to exercise his powers under s 30(13)(a)(bb) of the Act to revoke the first court order of the CFC dated 23 May 2006. G H

[18] In my opinion, it is the duty of the protector to assist the CFC to come to a correct decision. From the records, it would appear that the protector did not inform the magistrate in the CFC of the latest developments and disputes between the first and second adoptive parents regarding the adoption and custody of the child. The magistrate, before making the second court order, should be reminded or made aware by the protector that the CFC had not conducted the new hearing under s 30(1)(b) and (c) of the Act as ordered by Datuk Zaharah bte Ibrahim J on 3 April I

2007. A proper investigation has to be made to determine who is the fit and proper person to have custody of the child. It is erroneous for the magistrate to liken the powers of the protector to that of the public prosecutor under s 254 of the CPC since it is clear that the powers of these two offices are totally different. The public prosecutor has the discretion to prosecute or not to prosecute any person for any offence alleged to be committed. The protector has been vested with his statutory powers under the Act and he has to exercise those powers properly in accordance with the provisions of the Act. The CFC cannot abdicate the responsibility imposed upon it by s 18, 19 and 30(1) to (12) of the Act by simply stating that as the protector has like powers as those of the public prosecutor under s 254 of the CPC to decline prosecution at any stage, then he, the magistrate, was bound to allow the application of the protector to cancel the first court order since such application has been made.

[19] In making the decision to revoke the first court order, the learned magistrate had therefore erred in fact and law.

[20] I allowed the appeal of the appellant for the following reasons:

[21] Based on the submissions of the appellant, it was confirmed that the new hearing before a new magistrate ordered by the Shah Alam High Court Judge, Datuk Zaharah bte Ibrahim J, has not been held yet. The protector, being fully aware of such order by the High Court, should not have jumped the gun or taken the premature step of applying under s 30(13)(a)(bb) of the Act to the CFC for the revocation of the magistrate's first court order of 23 May 2006 (affirming the original order of 29 April 2005).

[22] In view of the new hearing which has yet to be conducted by a new magistrate, as chairman of the CFC, even with proof of registration of adoption of the child as shown by the second adoptive parents, the magistrate should not have allowed the application of the protector.

[23] This court, being now appraised of the new facts as submitted by the appellant, is convinced that in the interest of justice, the appeal of the appellant is to be allowed ie the magistrate's second court order made on 24 July 2008 is to be set aside, which means the child is still under the custody of the second adoptive parents, until the age of 18, as fit and proper persons vide the magistrate's first court order made on 23 May 2006 (which affirmed the original order of 29 April 2005) pending the outcome of the new hearing before a new magistrate in the CFC.

[24] The new facts as disclosed by the appellant are as follows:

(a) there are pending Kuala Lumpur High Court proceedings filed by the appellant for custody of the child;

(b) there are pending adoption proceedings in the Sessions Court, Shah Alam (filed by the second adoptive parents) and the appellant's application to intervene in such proceedings;

(c) at the time when the first magistrate, Tuan Azroul Hisham bin Azulan, heard the application of the protector and gave the original order on 29 April 2005, he was not made aware that the appellant had an interest in the decision and had written to the welfare officer about it. The appellant was waiting outside the CFC, but was excluded from the entire proceedings, and therefore denied the opportunity to inform the CFC of his interest in the child. At that time, there were already the Kuala Lumpur High Court proceedings taken by the appellant regarding custody of the child and which were still pending;

(d) there are now new issues regarding the status of the registration of adoption obtained by the second adoptive parents for the adoption of the child eg whether the second adoptive parents had failed to inform the JPN of the appellant's interest in the child, and whether such registration is valid if, as alleged by the appellant, the requirement of the period of two years of custody has not been fulfilled. There are related issues on whether the child was left with the second adoptive parents in February 2004 (as alleged by the second adoptive parents) or in August 2004 (as alleged by the appellant and his wife), and all these issues have to be dealt with in the appropriate CFC and also in the civil court proceedings;

(e) the appellant and his wife are now living together and no longer judicially separated, and in their new circumstances, if allowed to appear before the new magistrate in the new hearing, may be able to present their case, and of their new improved circumstances of their matrimonial home to the CPC. This may affect the outcome of the decision of the CFC in the new hearing; and

(f) the allegations of the surrepticious acts of the second adoptive parents made by the appellant have to be considered by the CFC before the new magistrate/chairman of CFC makes the order pursuant to the new hearing.

[25] Based on the above, there is no good reason to revoke or cancel the first court order of the CFC made on 23 May 2006. This court thinks it best let the status quo remain until the new magistrate/chairman of CFC makes a decision under s 30(1)(b) and (c) of the Act on the issue as to who is the fit and proper person to have custody of the child.

[26] I therefore allowed the appeal and made the following orders on 31 July 2009.

A **[27]** The order of the magistrate in the CFC dated 24 July 2008 was set aside and the order of the CFC dated 23 May 2006 (which affirmed the order of the CFC dated 29 April 2005) was upheld and maintained until the decision of the new hearing before the new magistrate, sitting as chairman in the CFC, as directed by Datuk Zaharah Ibrahim J in the High Court in Shah
B Alam (Criminal Division) on 3 April 2007.

[28] I also ordered that the new hearing before the new magistrate in the CFC be held forthwith.

C **[29]** There was no order as to costs even though this was prayed for by the appellant.

Appeal allowed.with no order as to costs.

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Reported by Kanesh Sundrum

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